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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARIO CHRISTOPHER RABANALES, Defendant and Appellant.	E069368 (Super.Ct.No. FVI17001143) OPINION

APPEAL from the Superior Court of San Bernardino County. Debra Harris, Judge. Affirmed with directions.

Renee Paradis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Arlene A. Sevidal, Collette Cavalier, and Minh U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Following a bar fight, a jury convicted defendant and appellant, Mario Christopher Rabanales, of simple assault (a misdemeanor; count 1) and battery resulting in serious bodily injury (a wobbler offense; count 2). (Pen. Code, §§ 240, 243, subd. (d).)[1] Defendant was sentenced to three years (the middle term) on his conviction in count 2 for battery resulting in serious bodily injury, doubled to six years based on his prior strike conviction. (§ 667, subds. (b)-(i).) A 90-day sentence was imposed but stayed on the simple assault conviction in count 1.

Defendant's sole claim in this appeal is that his sentence must be vacated because the court misapprehended the scope of its discretion when it denied his section 17, subdivision (b) (hereafter section 17(b)) motion to reduce his felony conviction in count 2, for battery resulting in serious bodily injury, to a misdemeanor at sentencing. He claims the record shows the court erroneously believed it lacked discretion to reduce the felony conviction to a misdemeanor because count 2 was charged as a felony and the jury found him guilty of the felony charge. The People counter the record shows the court was "well aware of its discretion" and did not abuse its discretion in denying the motion based on defendant's criminal history.

We conclude that the record indicates the court *may have* misunderstood the scope of its discretion on the section 17(b) motion. On the one hand, the court initially stated its tentative decision was to deny the motion "even if it was appropriate to do so at this

[1] Undesignated statutory references are to the Penal Code.

point" based on defendant's criminal history. But shortly thereafter, the court indicated it mistakenly believed it lacked discretion to reduce defendant's felony conviction in count 2 to a misdemeanor because count 2 was charged as a felony and the jury convicted defendant in count 2 as a felony.

Thus, we vacate defendant's sentence and remand the matter to the court with directions to exercise its discretion to determine whether defendant's felony conviction in count 2 should be classified and punished as a misdemeanor, and to resentence defendant accordingly. We affirm the judgment in all other respects.

II. FACTS AND PROCEDURAL BACKGROUND

A. *Factual Background*

On January 27, 2017, defendant and his wife were at a bar in Needles. A bartender, the bar's owner, and two regulars, R.A. and "Biz," were also in the bar. Defendant and his wife were sitting with Biz and R.A., and they shared two or three pitchers of beer. Around 9:30 p.m., an argument broke out between R.A. and Biz. Defendant joined the argument and got into a "scuffl[e]" with Biz. Defendant and Biz were separated, and the owner told them they had to leave.

R.A. then walked up and punched defendant in the face. Defendant left the bar, and five to 10 minutes later the bartender began walking R.A. to R.A.'s car. As soon the bartender and R.A. were outside, defendant appeared from around a corner, ran toward them, and punched R.A. in the face. R.A. fell backwards into a wall, collapsed, and lost

consciousness for several minutes. R.A. was taken to a hospital and received two stitches for a cut on his face.

B. *The Charges, Convictions, and Findings*

Defendant was charged in an information with assaulting R.A. by means of force likely to produce great bodily injury (§ 245, subd. (a)(4); count 1) and battery resulting in serious bodily injury on R.A. (§ 243, subd. (d)). The information alleged count 2 was a serious and violent felony. (§§ 1192.7, subd. (c), 667.5, subd. (c).) The information further alleged defendant personally inflicted great bodily injury on R.A. in count 1 (§ 12022.7, subd. (a)), and had a prior strike conviction which also constituted a prior serious felony conviction (§§ 667, subds. (b)-(i), 667, subd. (a)).

The jury found defendant guilty of simple assault (§ 240), the lesser included offense to the charged offense in count 1, and found the great bodily injury allegation in count 1 not true. The jury found defendant guilty as charged in count 2 of battery resulting in serious bodily injury. (In count 2, the jury was instructed on both simple assault and simple battery (§§ 240, 242) as lesser included offenses.) In a bifurcated proceeding, the jury found defendant had a prior conviction for attempted murder (§§ 664, 187), which constituted a prior strike. Neither the court nor the jury was asked to determine or did determine whether the prior strike was also a prior serious felony conviction, as the information alleged.

C. *Defendant's Section 17(b) Motion*

Before sentencing, defendant filed a motion to reduce his felony conviction for battery resulting in serious bodily injury (§ 243, subd. (d)) to a misdemeanor. In his motion, he argued his conviction in count 2 "really is a misdemeanor that the prosecutor should have charged as such. . . . section 17(b) gives the court the authority to exercise its discretion and reduce a charge that is filed as a felony to a misdemeanor when the charged felony is a 'wobbler,' a crime that can be charged either as a misdemeanor or a felony." The motion went on to describe the factors the court could consider in ruling on the motion and urged the court to exercise its discretion to reduce the felony conviction in count 2 to a misdemeanor.

The People opposed the section 17(b) motion. In their opposition, they argued the court should *not* reduce count 2 to a misdemeanor based on defendant's criminal history (he had four prior felony convictions), the nature and circumstances of his current offense (he was "motivated by anger and a desire for revenge, circumstance[s] which are likely to reoccur given his propensity for starting physical fights"), and his attitude toward his current offense (he lacked remorse).

The probation report showed defendant was born in 1982 and was 35 years old when he committed the current offenses on January 27, 2017. Defendant has an extensive criminal history dating back to 2001, including a 2007 attempted murder conviction (§ 664, 187), the basis of his prior strike conviction.

Most recently, in December 2014, defendant was convicted of felony vandalism (§ 594, subd. (a)) and was sentenced to four years in state prison. On October 6, 2016, he was released on Post Release Community Supervision (PRCS), and he was in compliance with the terms of his PRCS until he was arrested for the current offenses on January 27, 2017.

D. *Sentencing*

At sentencing, the court told the parties that its tentative ruling was to deny the section 17(b) motion "*even if it was appropriate to do so at this point, and that's based on defendant's criminal history and the fact that I believe he had just been recently release from custody*." (Italics added.)

Defense counsel argued the motion should be granted because there were factors in mitigation, namely, the victim, R.A., was "a participant" in the initial altercation with defendant inside the bar and "did strike [defendant] first" inside the bar. In addition, R.A.'s cousin, Biz, pulled out a knife during that initial altercation. (See Cal. Rules of Court, rule 4.423(a)(2)-(5).)

Additionally, defense counsel argued this was "a one-punch case" and the jury's verdicts and findings showed it believed defendant's actions were "of a misdemeanor assaultive quality," but the jury did not have the option of convicting defendant of a misdemeanor in count 2 given that it was charged as a felony. More specifically, counsel argued that the jury's rejection of the charged offense in count 1 of assault by means of force likely to produce great bodily injury in favor of simple assault, and its not true

finding on the great bodily injury allegation in count 1, "reflects what . . . the jury felt of the punch and is reflective of the quality of the [section] 243[, subdivision] (d), that he was not intending to commit a felony when he threw the one punch."

The court responded: "I wanted to respond to that so that the record is very clear. [¶] I think that is a very good point that you have raised . . . . But the Court will be in a position to make a decision regarding an element of, you know, serious bodily injury, which could be construed as equal to great bodily injury. And the reason I think this is an excellent point to raise is that there is an indication from the jury [that] this was just one act, one punch, and one injury, and there is indication that when the jury had to decide whether the injury was great bodily injury or not, they found that it was not great bodily injury. . . . [¶] . . . [¶] . . . But, and so *I can see your argument where you would be inviting the Court to make a finding consistent with what the jury found, but I don't think that—I don't find where there's any basis or authority for me to undercut the jury when this was charged as a felony and they found true.* [¶] So I wanted to make *–and if I'm wrong, that there is discretion*, and that I believe you did ask for the [section 17(b)]—not the [section 17(b)], but you did ask for the lesser for this count, and you did raise that argument, and that's why I wanted to put my rationale on the record for appeal." (Italics added.)

The court denied the section 17(b) motion and, as noted, sentenced defendant to three years in state prison on count 2 (the middle term), doubled to six years based on his

prior strike, and imposed but stayed a 90-day term on the simple assault conviction in count 1. Defendant appeals.

III. DISCUSSION

A wobbler is an offense that is "*chargeable* or, in the discretion of the court, *punishable* as either a felony or a misdemeanor." (*People v. Park* (2013) 56 Cal.4th 782, 789, italics added.) Wobblers are by definition punishable by a state prison term (as a felony) or by imprisonment in the county jail and/or by a fine (as a misdemeanor). (*Ibid*.; *People v. Feyrer* (2010) 48 Cal.4th 426, 430, 433, fn. 4 [§ 17, subd. (a) "classifies crimes according to their punishment, defining a felony as a crime 'punishable with death or by imprisonment in the state prison,' and a misdemeanor as every other crime except those offenses classified as an infraction."].) Battery resulting in serious bodily injury is a wobbler because it is punishable by two, three, or four years in state prison (as a felony) or by a county jail term not exceeding one year (as a misdemeanor). (§ 243, subd. (d); *People v. Wilkinson* (2004) 33 Cal.4th 821, 831.)

Courts have sentencing discretion to impose misdemeanor or felony punishment on any felony conviction for a wobbler offense. (See *People v. Mullins* (2018) 19 Cal.App.5th 594, 612 ["The discretion to sentence as either a felony or misdemeanor applies to all wobblers."]; see also *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974, fn. 4 [the court's sentencing discretion "derives from the various charging statutes that provide alternative felony or misdemeanor punishment" for the offense].) And, "[w]hen a fact finder has found the defendant guilty of . . . a wobbler *that was not*

charged as a misdemeanor, the procedures set forth in section 17, subdivision (b) . . . govern the court's exercise of discretion to classify the crime as a misdemeanor." (*People v. Park*, *supra*, 56 Cal.4th at p. 790, italics added.)[2]

Because the conduct underlying a wobbler offense "can vary widely in its level of seriousness," the Legislature has vested courts with broad discretion "to decide, in each individual case, whether the crime should be classified [and punished] as a felony or a misdemeanor." (*People v. Tran* (2015) 242 Cal.App.4th 877, 885; *People v. Superior Court (Alvarez), supra,* 14 Cal.4th at p. 977 ["section 17(b), read in conjunction with the relevant charging statute, rests the decision whether to reduce a wobbler [to a misdemeanor] solely 'in the discretion of the court.'"].)

The factors the court may consider in exercising its discretion to classify and punish a felony conviction for a wobbler as a misdemeanor include "those relevant to sentencing decisions, such as the circumstances of the offense, the defendant's appreciation of and attitude toward the offense, and the defendant's character as evidenced by the defendant's behavior and demeanor at the trial." (*People v. Mullins, supra,* 19 Cal.App.5th at p. 611.) In other words, the court may consider "the facts surrounding the offense and the characteristics of the offender." (*People v. Tran, supra,* 242 Cal.App.4th at p. 885.) "As a general matter, the court's exercise of discretion under

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[2] Section 17(b) provides, in pertinent part: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail . . . it is a misdemeanor for all purposes under the following circumstances: [¶] (1) After a judgment imposing a punishment other than imprisonment in the state prison . . . ."

section 17(b) contemplates the imposition of misdemeanor punishment for a wobbler 'in those cases in which the rehabilitation of the convicted defendant either does not require, or would be adversely affected by, incarceration in a state prison as a felon.' [Citation.]" (*People v. Park, supra*, 56 Cal.4th at p. 790.) But "'[b]ecause each case is different, and should be treated accordingly, . . . we repose confidence in the discretion of the court to impose a sentence that is appropriate in light of *all* relevant circumstances.'" (*People v. Tran, supra,* at p. 887, quoting *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1393.)

We review the trial court's exercise of its sentencing discretion to grant or deny a section 17(b) motion for an abuse of discretion. (*People v. Superior Court (Alvarez), supra,* 14 Cal.4th at p. 977.) "The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary." (*Ibid*.) "'When the court properly exercises its discretion to reduce a wobbler to a misdemeanor, it has found that felony punishment, and its consequences, are not appropriate for that particular defendant. [Citation.] Such a defendant is not blameless. But by virtue of the court's proper exercise of discretion, neither is such defendant a member of the class of criminals' convicted of an offense the Legislature intended to be subject to felony punishment. [Citation.]" (*People v. Tran, supra*, 242 Cal.App.4th at p. 886, citing *People v. Park, supra*, 56 Cal.4th at pp. 801-802.)

Defendant claims his sentence must be "reversed" (or vacated) and the matter remanded because the record shows the trial court misapprehended the scope of its sentencing discretion when it denied his section 17(b) motion to reduce his felony

conviction for battery resulting in serious bodily injury (§ 243, subd. (d)) to a misdemeanor. We agree.

The court initially stated it was inclined to deny the section 17(b) motion based on defendant's criminal history and his recent release from custody. But after defense counsel argued that the jury's verdicts and findings indicated that the jury believed defendant's actions were "of a misdemeanor quality," the court indicated it did not believe it had authority to reduce defendant's felony conviction to a misdemeanor because the offense had been charged as a felony and the jury had convicted defendant of the offense as a felony. The court stated: "*I don't think that—I don't find where there's any basis or authority for me to undercut the jury when this was charged as a felony and they found true.* [¶] *So I wanted to make—and if I'm wrong, that there is discretion, and that I believe you did ask for the [section 17(b)]—not the [section 17(b)], but you did ask for the lesser for this count [2], and you did raise that argument, and that's why I wanted to put my rationale on the record for appeal.*" (Italics added.) The court was mistaken to the extent it believed it did not have discretion to classify and punish defendant's felony conviction for battery resulting in serious bodily injury as a misdemeanor. As noted, "[t]he discretion to sentence as either a felony or misdemeanor applies to all wobblers" (*People v. Mullins*, *supra*, 19 Cal.App.5th at p. 612), including a wobbler which, like defendant's conviction in count 2, was charged as a felony and for which defendant was convicted as a felony (see *People v. Park*, *supra*, 56 Cal.4th at p. 790).

Further, "[d]efendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (*People v. Belmontes* (1983) 34 Cal.3d. 335, 348, fn. 8.) "Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)

Here, remand is necessary because, although the record indicates that the court *may have* appropriately denied defendant's section 17(b) motion based on defendant's criminal history and the fact he had only recently been released from state prison when he committed the current offenses, the record also indicates that the court mistakenly believed it did not have discretion to reduce defendant's felony conviction in count 2 to a misdemeanor *in any event, and regardless of the nature of his conduct underlying the current offenses*, because the offense was charged as a felony and the jury convicted defendant of the offense as a felony. The court described as "a very good point" defense counsel's argument that the jury's verdicts and findings indicated the jury believed defendant's conduct in committing count 2 was "of a misdemeanor assaultive quality," and the court stressed that it "wanted to put [its] rationale on the record for appeal." Thus, on this record, the court may have classified and punished count 2 as a

misdemeanor had it understood that it had discretion to do so under section 17(b). (*People v. Lee* (2017) 16 Cal.App.5th 861, 874-875 [felony sentence vacated and matter remanded with directions to exercise discretion whether to reduce felony convictions to misdemeanors where record showed court erroneously believed it lacked discretion under § 17(b) to reduce the felony convictions to misdemeanors]; cf. *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 ["Remand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so."].)

The People argue defendant "misconstrues the court's comments" at sentencing and that the court did not abuse its discretion in denying defendant's section 17(b) motion based on defendant's criminal history. They argue the court was merely stating, in response to defense counsel's argument, that the jury had been instructed on lesser included *misdemeanor* offenses in count 2 (simple assault and simple battery) but the jury found defendant guilty of the charged *felony* of battery resulting in serious bodily injury, and the court had no authority or discretion to substitute its judgment for the jury's verdict in count 2. They argue: "As the court correctly noted, nothing in section [17(b)] [gave] it discretion or authority to disregard the jury's verdict and, instead, conclude the jury found the offense was misdemeanor conduct." They read the court's comments as indicating that "the court simply declined to find the jury's verdict for simple assault [in count 1] indicated the jury necessarily found the battery resulting in serious bodily injury [in count 2] to also be misdemeanor conduct."

We are not persuaded. As explained, the court's comments indicate that the court mistakenly believed it did not have discretion to classify and punish defendant's felony conviction in count 2 as a misdemeanor. Although the court certainly had discretion to deny the section 17(b) motion based on defendant's criminal history and other factors, the record does not clearly show that the court understood that it had discretion to grant the motion and indicates it may have granted the motion had it understood that it had discretion to do so.

IV. DISPOSITION

Defendant's sentence is vacated and the matter is remanded to the trial court with direction to exercise its discretion and determine whether to classify defendant's felony conviction in count 2 for battery resulting in serious injury (§ 243, subd. (d)) as a misdemeanor, and to thereafter resentence defendant. The court is directed to forward certified copies of all relevant documents to the appropriate authorities. In all other respects, the judgment is affirmed.

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FIELDS
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.